Metrobus Nationwide Sdn Bhd v Lembaga Perlesenan Kenderaan Perdagangan Semenanjung Malaysia & Anor

HIGH COURT (KUALA LUMPUR) — APPLICATION FOR JUDICIAL REVIEW NO R2–25–224 OF 2007
ALIZATUL KHAIR J
28 MARCH 2012

Administrative Law — Subsidiary legislation — Ultra vires — Fare rates for public transport stage buses prescribed in Rules under Commercial Vehicles Licensing Board Act 1987 — Licensing Board empowered by Act to attach conditions when granting licences — Whether Board's decision to allow RapidKL to charge lower fares than that prescribed in Rules ultra vires — Whether Board had statutory duty to follow Rules when exercising discretion to attach conditions — Whether applicant unfairly discriminated against — Whether Board's decision mala fide — Whether applicant proved loss it suffered due to lower fares charged by RapidKL

The applicant, Metrobus Nationwide Sdn Bhd, was licensed by the first respondent, the Peninsular Malaysia Commercial Vehicles Licensing Board ('the Board') to provide public transport using stage buses. The Board, established under the Commercial Vehicles Licensing Board Act 1987 ('the Act') to, inter alia, grant licences to operate various classes of public service vehicles, had a discretion, under s 19(1)(a) of the Act, to attach such conditions as it thought fit to the licences it granted. The fare rates for stage buses licensed to operate within Peninsular Malaysia were prescribed under the Commercial Vehicles Licensing Board (Rates of Fare) Rules 2000 ('the Rules') made pursuant to s 56(1) of the Act. The fares charged by the applicant were as prescribed in the Rules ('the prescribed rates'). The applicant's complaint was that the fares charged by another government-owned company, RapidKL, on its stage buses were much lower than the prescribed rates. Because of that, and the fact that RapidKL's bus service routes overlapped 44 of the routes serviced by the applicant, the applicant alleged its business had been adversely affected and it suffered loss and other financial problems. RapidKL was established by the second defendant to provide an integrated public transport system in the Klang Valley incorporating bus and rail services. The applicant alleged the lower rates RapidKL was allowed to charge was unfairly discriminatory and enabled RapidKL to eventually monopolise public stage bus services in the Klang Valley and drive other stage bus operators out of business. When the applicant's meetings with the respondents to solve the problem proved futile, the applicant sent a letter of demand to the Board demanding it, inter alia, enforce the prescribed rates on RapidKL. The Board replied referring to a decision it had already made ('the Board's decision') allowing RapidKL to

impose fares which were not in accordance with the prescribed rates. The applicant filed the instant judicial review application for (a) an order of mandamus to direct the respondents to enforce the prescribed rates on RapidKL (b) a declaration that the Board's decision and the respondents' failure, refusal or omission to enforce the prescribed rates on RapidKL violated art 8(1) of the Federal Constitution and were ultra vires the Rules and (c) damages for losses suffered by the applicant to be assessed by the court with interest. The applicant contended the Board had a statutory duty to comply with the Rules when attaching conditions to a licence under s 19(1)(a)(i) of the Act. As such, RapidKL should have been subject to the same prescribed fare rates as had been imposed on the applicant.

Held:

(1) The Board's decision to approve RapidKL's application to impose lower rates of fare for stage buses was *ultra vires* the Rules. As the prescribed rates was based on a zoning system, the Board could not purport to authorise RapidKL to impose lower fares than those prescribed on the ground it was based on a different system as such a system was not provided for in the Rules (see para 47).

(2) There was insufficient evidence to support a finding of unfair discrimination. The facts relied upon by the applicant to show unfair discrimination did not leave the court with the impression the applicant had received 'harsh, unreasonable or unfair treatment' at the hands of the respondents (see paras 72 & 73).

(3) The applicant failed to show by credible and cogent evidence that the loss it allegedly suffered was due to the lower fares charged by RapidKL. It failed to establish a nexus between the reduction in its income or profits from its fare collection and the introduction of RapidKL's fares. The purported reduction in the daily and monthly fare collection was not based on any study or survey done by the applicant (see para 76).

(4) The alleged losses suffered by the applicant could have been due to a variety of factors which might or might not include the lower fares charged by RapidKL. In the absence of any survey or study or any other form of verification, attributing the loss to the Board's decision was purely an assumption on the applicant's part (see paras 69 & 76).

(5) It was implicit that when exercising its discretion under s 19(1)(a)(i) of the Act, the Board would act in accordance with the law ie it would exercise it subject to the Rules. That requirement, however, did not amount to a duty under the law as envisaged by s 44(1)(b) of the Specific Relief Act 1950 ('SRA'). No such clear legal duty was imposed on the

Board by s 19(1)(a)(i) such that its refusal to perform that duty would justify the grant of *mandamus* under s 44(1) of the SRA (see paras 111–113).

(6) The Board's explanation that the approval given to RapidKL's fares was based on the policy objective of providing an integrated public transport service in the Klang Valley had to be accepted in the absence of any evidence to the contrary. Based on that explanation, it could not be said that the Board's decision was made mala fide, but, rather, to have been made in good faith or at least with bona fide intention (see para 91).

[Bahasa Malaysia summary

Pemohon, Metrobus Nationwide Sdn Bhd, telah diberi lesen oleh responden pertama, Peninsular Malaysia Commercial Vehicles Licensing Board ('Lembaga') untuk menyediakan pengangkutan awam menggunakan bas perantara. Lembaga tersebut, yang ditubuhkan di bawah Akta Lembaga Pelesenan Kenderaan Komersial 1987 ('Akta tersebut') untuk, antara lain, memberikan lesen bagi menjalankan pelbagai kelas kenderaan perkhidmatan awam, mempunyai budi bicara, di bawah s 19(1)(a) Akta tersebut, untuk mengenakan syarat tersebut sebagaimana difikirkan sesuai untuk lesen tersebut yang diberikannya. Kadar tambang untuk bas perantara yang diberi lesen untuk beroperasi di Semenanjung Malaysia ditetapkan di bawah Kaedah-Kaedah Lembaga Pelesenan Kenderaan Komersial (Kadar Tambang) 2000 ('Kaedah tersebut') yang dibuat menurut s 56(1) Akta tersebut. Tambang yang dikenakan oleh pemohon adalah sepertimana ditetapkan dalam Kaedah tersebut ('kadar yang ditetapkan'). Aduan pemohon adalah bahawa tambang yang dikenakan oleh satu lagi syarikat milik kerajaan, RapidKL, berhubung bas perantaranya adalah lebih rendah daripada kadar yang ditetapkan. Oleh kerana itu, dan fakta bahawa laluan perkhidmatan bas RapidKL bertindan dengan 44 laluan yang diberikan oleh pemohon, pemohon mengatakan perniagaannya telah terjejas teruk dan ia mengalami kerugian dan masalah kewangan lain. RapidKL yang telah ditubuhkan oleh defendan kedua memberikan sistem perkhidmatan pengangkutan awam yang berintegrasi di Lembah Klang yang merangkumi perkhidmatan bas dan landasan. Pemohon mengatakan kadar yang lebih rendah RapidKL dibenarkan untuk dikenakan telah didiskriminasikan secara tidak adil dan membolehkan RapidKL akhirnya memonopoli perkhidmatan bas perantara awam di Lembah Klang dan mengakibatkan operator bas perantara lain hilang perniagaan. Apabila mesyuarat pemohon dengan responden untuk menyelesaikan masalah terbukti tidak berhasil, pemohon telah menghantar surat tuntutan kepada Lembaga menuntut agar ia, antara lain, menguatkuasakan kadar yang ditetapkan ke atas RapidKL. Lembaga menjawab dengan merujuk kepada keputusan yang telah dibuatnya ('keputusan Lembaga') membenarkan RapidKL mengenakan kadar yang tidak menurut kadar yang ditetapkan. Pemohon telah memfailkan semakan kehakiman ini untuk: (i) perintah mandamus untuk mengarahkan

responden menguatkuasakan kadar yang ditetapkan ke atas RapidKL; (ii) deklarasi bahawa keputusan Lembaga dan kegagalan, keengganan atau peninggalan responden untuk menguatkuasakan kadar yang ditetapkan ke atas RapidKL melanggar perkara 8(1) Perlembagaan Persekutuan dan adalah ultra vires Kaedah tersebut; dan (iii) ganti rugi untuk kerugian yang dialami oleh pemohon ditaksir oleh mahkamah dengan faedah. Pemohon menegaskan Lembaga mempunyai kewajipan statutori untuk mematuhi Kaedah tersebut apabila meletakkan syarat kepada lesen di bawah s 19(1)(a)(i) Akta tersebut. Oleh itu, RapidKL hendaklah tertakluk kepada kadar ditetapkan sebagaimana yang dikenakan ke atas pemohon.

Diputuskan:

(1) Keputusan Lembaga meluluskan permohonan Lembaga untuk mengenakan kadar tambang lebih rendah untuk bas pengantara adalah *ultra vires* Kaedah tersebut. Oleh kerana kadar yang ditetapkan berdasarkan sistem zon, Lembaga tidak boleh bertujuan untuk memberi kuasa kepada RapidKL untuk mengenakan tambang lebih rendah daripada yang ditetapkan berdasarkan sistem berbeza kerana sistem sedemikian tidak diperuntukkan dalam Kaedah tersebut (lihat perenggan 47).

(2) Terdapat keterangan yang tidak mencukupi untuk menyokong penemuan diskriminasi yang tidak adil. Fakta yang digunakan oleh pemohon untuk menunjukkan diskriminasi yang tidak adil tidak memberikan mahkamah gambaran pemohon telah menerima 'harsh, unreasonable or unfair treatment' di tangan responden-responden (lihat perenggan 72 & 73).

(3) Pemohon telah gagal menunjukkan keterangan yang boleh dipercayai bahawa kerugian yang dikatakan telah dialaminya adalah sebab tambang yang dikurangkan oleh RapidKL. Ia gagal membuktikan kaitan antara pengurangan dalam pendapatannya atau keuntungannya dalam pendapatan atau keuntungan daripada kutipan tambangnya dan pengenalan tambang RapidKL. Pengurangan yang dikatakan dalam kutipan tambang harian dan bulanan bukan berdasarkan mana-mana kajian atau kaji selidik yang dilakukan oleh pemohon (lihat perenggan 76).

(4) Kerugian yang dikatakan telah dialami oleh pemohon mungkin disebabkan oleh pelbagai faktor yang mungkin atau tidak mungkin melibatkan tambang lebih murah yang dikenakan oleh RapidKL. Tanpa apa-apa kaji selidik atau kajian atau apa-apa bentuk pengesahan, yang menyumbang kepada kerugian dan keputusan Lembaga adalah andaian semata-mata di pihak pemohon (lihat perenggan 69 & 76).

(5) Adalah penting apabila menggunakan budi bicaranya di bawah

s 19(1)(a)(i) Akta tersebut, Lembaga akan bertindak menurut undang-undang, iaitu ia tertakluk kepada Kaedah tersebut. Syarat itu bagaimanapun tidak membentuk kewajipan di bawah undang-undang sebagaimana termaktub di bawah s 44(1)(b) Akta Relief Spesifik 1950 ('ARS'). Tiada kewajipan undang-undang sah dikenakan ke atas Lembaga oleh s 19(1)(a)(i) yang mana keengganannya untuk melaksanakan kewajipan tersebut mewajarkan pemberian mandamus di bawah s 44(1) ARS (lihat perenggan 111–113).

(6) Penjelasan Lembaga bahawa kelulusan yang diberikan untuk tambang RapidKL adalah berdasarkan objektif polisi untuk menyediakan perkhidmatan pengangkutan awam yang berintegrasi di kawasan Lembah Klang yang patut diterima tanpa apa-apa keterangan yang bertentangan. Berdasarkan penjelasan tersebut, tidak boleh dikatakan bahawa keputusan Lembaga berniat jahat ataupun telah dibuat dengan niat baik atau sekurang-kurangnya dengan niat baik (lihat perenggan 91).]

Notes

For cases on ultra vires, see 1(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 1029–1032.

Cases referred to

Ahmad Tajudin bin Hj Ishak v Suruhanjaya Pelabuhan Pulau Pinang [1997] 1 MLJ 241, CA (refd)

Chua Bak Heng v Reg [1957] MLJ 247 (refd)

Government of Federation of Malaya v Surinder Singh Kanda [1961] 1 MLJ 1 (refd)

Koon Hoi Chow v Pretam Singh [1972] 1 MLJ 180 (refd)

Kredin Sdn Bhd v OCBC Bank (Malaysia) Bhd [1998] 3 MLJ 78; [1998] 2 CLJ 797, HC (refd)

Loh Kooi Choon v Government of Malaysia [1977] 2 MLJ 187; [1975] 1 LNS 90, FC (refd)

Ng Bee v Chairman Town Council, Kuala Pilah [1975] 1 MLJ 273 (refd)

Osman bin Mohd Idris & Ors v Ketua Pengarah Perkhidmatan Awam Malaysia [2006] 4 MLJ 516; [2006] 3 CLJ 106, CA (refd)

Reg v Secretary of State for Transport, Ex parte Factortame Ltd [1990] 2 AC 85 (refd)

State of West Bengal v Anwar Ali Sankar AIR 1952 75, SC (refd)

Sunday Lake Iron Co v Wakefield (1918) 247 US 350, SC (refd)

Thien Tham Sang v United States Army Medical Research Unit & Anor [1983] 1 MLJ 97 (refd)

Vishundas Hundumal v The State of Madhya Pradesh AIR 1981 SC 1636, SC (refd)

Workon Sdn Bhd v The Director of Land & Surveys, Sabah [1999] 4 MLJ 177, HC (refd)
Yick Wo v Hopkins (1886) 118 US 356, SC (refd)

Legislation referred to

Commercial Vehicles Licensing Board Act 1987 ss 2, 3(1), 14(1), 16(1), 19(1)(a), 19(1), 19(1)(a)(i), 19(1)(a)(ii), 56(1), 56(1)(b)
Commercial Vehicles Licensing Board (Rates of Fare) Rules 2000 r 3(1), Schedule, Part 1
Constitution of India art 14
Courts of Judicature Act 1964 ss 96, 97
Federal Constitution arts 8, 8(1), 160(2)
Interpretation Acts 1948 and 1967 ss 3, 99(2)
Motor Vehicles (Construction and Use) Rules 1948 rr 94, 95, 96
Road Transport Ordinance (Cap 227) s 44(1)(d)
Rules of the High Court 1980 O 53, O 53 r 1(2)
Specific Relief Act 1950 s 44(1), 44(1)(b)
West Bengal Special Court Act 1950 [IND] s 5(1)

Wong Kian Kheong (Wong Kian Kheong) for the appellant.
(Senior Federal Counsel, Attorney General's Chambers) for the respondent.

Alizatul Khair J:

[1] The applicant, Metrobus Nationwide Sdn Bhd (the applicant) filed this application for judicial review seeking, inter alia, the following reliefs:

(a) an order of mandamus directing the first respondent, Lembaga Pelesenan Kenderaan Perdagangan Semenanjung Malaysia (the first respondent) and the second respondent (the second respondent) to enforce the rates of fare as prescribed under the Commercial Vehicles Licensing Board (Rates of Fare) Rules 2000 on RapidKL ('said Rules');

(b) a declaration that:

(i) the first respondent's decision on 28 March 2006 approving RapidKL's application to impose rates of fare for stage buses as defined under the Commercial Vehicles Licensing Board Act 1987 (the said Act) without adhering to the said Rules (the first respondent's decision); and

(ii) failure, refusal or omission on the part of the first respondent and/or the part of the second respondent to enforce the rates of fare as prescribed under the said Rules on RapidKL have violated art 8(1) of the Federal Constitution and the said Rules.

(c) an order of damages to be paid by the first respondent and the second

respondent to the applicant for the loss and damage suffered by the applicant as a result of the first respondent's decision and the first respondent and/or the second respondent's abovesaid failure, refusal or omission and for the amount of damages to be assessed by the court; and

(d) an order that the first respondent and the second respondent to pay to the applicant interest at the rate of 8%pa on the said damages from the date of assessment until full satisfaction of the damages.

BACKGROUND

[2] The applicant is engaged in the business of providing public transport services.

[3] The first respondent is a statutory body established under s 3(1) of the said Act, whose powers include, inter alia, the following:

(a) granting of licenses to operate various classes of public service vehicles as provided under the said Act (ss 14(1) and 16(1)); and

(b) attaching conditions to licenses as the first respondent thinks fit (s 19(1)(a) of the said Act).

[4] In 1992, the applicant was granted a license to provide shuttle bus services by the first respondent under the said Act.

[5] In 2001, the applicant was granted a license to operate stage buses as defined under the said Act.

[6] The rates of fare for stage buses licensed and authorised to operate within Peninsular Malaysia under the said Act is set out in Part 1 of the First Schedule to the said Rules (see r 3(1) of the said Rules) (the prescribed rates).

[7] It is not in dispute that the fares charged by the applicant for its stage bus services are and were at all material times, in accordance with the said Rules.

[8] In 2003, the second respondent established Syarikat Prasarana Negara Bhd (SPNB) to implement the second respondent's latest policy regarding the provision of public transportation in the Klang Valley under the programme known as 'Integrasi dan Penyusunan Semula Sistem Pengangkutan Awam di Lembah Kelang (INSPAK)'.

[9] Pursuant thereto, SPNB took over, among others, the routes and buses of

two public transport companies which provided stage bus services in Klang Valley, namely Intrakota and Cityliner. A

[10] On 26 July 2004, the second respondent through the Ministry of Finance, incorporated Rapid KL, a special purpose company for the purpose of implementing INSPAK, ie to provide an integrated public transport system in the Klang Valley incorporating bus and rail services. B

[11] Around November 2004, SPNB handed over the operations of, among others, the stage bus services of Intrakota and Cityliner to RapidKL. C

[12] The applicant contended and it is not disputed that the fares charged by RapidKL for its stage bus services were much lower as compared to the prescribed rates (RapidKL's fares). D

[13] The applicant also alleged that the 44 routes where RapidKL is and was operating its stage bus services overlap with those of the applicant. Consequently the applicant claimed they suffered loss and other financial problems as a result of RapidKL's fares, (see para 13x of the statement, encl (21) E

[14] According to the applicant they had appealed to the first respondent and/or the second respondent on various occasions through meetings, as well as letters, to take all necessary action to resolve the applicant's aforesaid problems. F

[15] At a meeting on 20 June 2005 the secretary general of the Ministry of Entrepreneur and Cooperative Development (Ministry) and the director of the first respondent informed the applicant's representative that the first respondent had called RapidKL regarding RapidKL's fares which were charged without the first respondent's approval. G

[16] However, despite the applicant's appeals to the first respondent and/or the second respondent on various occasions through meetings as well as letters, the first respondent and/or the second respondent failed, refused or omitted to take any action with regard to RapidKL's fares. H

[17] On 10 August 2007, the applicant sent a letter of demand to the first respondent demanding the first respondent to, inter alia, enforce the prescribed rates on RapidKL. I

[18] On 30 August 2007, the applicant's solicitors received a letter dated 28 August 2007 from the first respondent informing the applicant of the first

respondent's decision.

GROUNDS OF APPLICATION

[19] In their application for judicial review the applicant relied on the following grounds in support of their application:

(a) the first respondent's decision was ultra vires the said Rules;

(b) the first respondent had failed to take into account relevant considerations in arriving at its decision;

(c) in arriving at its decision, the first respondent and the second respondent had acted in such a manner that no reasonable public authority in similar circumstances would have acted;

(d) the applicant had been unfairly discriminated by the first respondent and/or the second respondent as a result of the first respondent's decision as well as the first respondent's and/or the second respondent's failure, refusal or omission to enforce the rates of fare as prescribed under the said Rules on RapidKL;

(e) the first respondent's decision as well as the abovesaid failure, refusal or omission on the part of the first respondent and/or the second respondent had violated the applicant's rights under art 8(1) of the Federal Constitution; and

(f) the first respondent and/or the second respondent had violated the applicant's legitimate expectation.

THE RESPONDENTS' REPLY

[20] In reply to the applicant's application, the respondents argued, firstly, that they had acted in accordance with the powers conferred on them under s 19(1)(a)(ii) of the said Act when approving RapidKL's fares.

[21] Secondly, the bus services provided by RapidKL do not fall within the cope of the said Rules:

(a) as the bus service provided by RapidKL is not based on a zoning system (*sistem zon*); and

(b) RapidKL's modus operandi is different from that of the applicants (see para 13; encl (12) — the first respondents affidavit in reply).

DECISION

[22] Having heard the oral submissions of learned counsel for the applicant and learned senior federal counsel for the first and second respondents and having perused carefully the written submissions and affidavits filed herein, I allowed the applicant's application in part and made the following order:

(a) an order for declaration as per prayer 4(b)(i) (of the statement, encl (2)) as being ultra vires the said Rules;

(b) prayer 4(a) (of the statement, encl (2)) is dismissed as there is no specific duty imposed on the first respondent and second respondent to enforce the said Rules under the said Act;

(c) no order on prayer 4(c) and (d) (of the statement, encl (2)) as based on the affidavits filed herein there was insufficient evidence for this court to find that the first and second respondents had unfairly discriminated against the applicant in favour of Rapid KL; and

(d) costs as in prayer 4(f) (of the statement, encl (2)) to the applicant.

[23] The reasons for my decision are as follows.

Ultra vires

[24] As stated earlier, one of the grounds in support of the applicant's application for judicial review is that the first respondent's decision is ultra vires. To recapitulate the first respondent decision refers to the decision of the first respondent on 28 March 2006 approving RapidKL's application to impose rates of fare for stage buses as defined under the said Act without adhering to the said Rules which was communicated to the applicant vide letter date 10 August 2007 by the director of the first respondent.

[25] It is not in dispute that s 16(1) of the said Act confers on the first respondent discretionary power to among others, grant licenses for public service vehicles. Under s 14(1) of the said Act, stage buses is specified as one of the class of public service vehicles which are required to be licensed.

[26] It is also not in dispute that under s 19(1) of the said Act the first respondent is empowered to impose such conditions as it may think fit when granting the license under s 16(1). Section 19(1) is pertinent to the applicant's case and it is therefore necessary to reproduce the relevant part of the section. The relevant part reads thus:

19(1) *Subject to this Act, the Board may attach* to any license granted under this Act *such conditions as it may think* fit and in particular —

(a) In relation to a specified class of public service vehicles license —

(i) that *specified fares shall be charged.*

(Emphasis added.)

[27] In this regard the Minister concerned has in exercise of his powers under s 56(1)(b) of the said Act, enacted the said Rules.

[28] Section 56(1) stipulates as follows:

The Minister may make rules for any purpose for which rules may be made under this Act and for prescribing anything which may be prescribed under this Act, and generally for the purpose of carrying this Act into effect, and in particular, but without prejudice to the generality of the foregoing provisions may make rules with respect to any of the following matters:

(b) the procedure on applications and the determination of questions in connection with the grant, variation, surrender, suspension and revocation of licenses and *conditions attached to licenses* and in connection with appeals … (Emphasis added.)

[29] The said Rules were made pursuant to s 56(1).

[30] It is common ground that the first respondent's decision was made in accordance with s 19(1) of the said Act. This is evident from the letter written by the director of the first respondent, Puan Naimah bt Ramli to the applicant's solicitors on 20 August 2007 (see A-11, encl (3)).

[31] The issue here is whether the first respondent's decision is ultra vires the said Rules.

[32] *The applicant's contention* is that the first respondent's discretion as provided under s 19(1)(i) of the said Act must be exercised subject to, among others, the said Rules. This is borne out by the opening words of s 19(1) of the said Act which states that '*subject to this Act*, the Board may attach to any license granted under this Act such conditions as it may think fit'.

[33] The applicant's view is that the words 'subject to' should be interpreted to mean that the first respondent's discretion must be exercised within the restrictions or limitations imposed by the said Act. In other words the applicant

contends that the first respondent in granting the license to RapidKL, may only impose conditions as regards the rates of fares to be charged such rates which have been prescribed under the said Act, namely the rates prescribed under the said Rules. Reliance for this proposition was placed on the Federal Court case of *Kredin Sdn Bhd v OCBC Bank (Malaysia) Bhd* [1998] 3 MLJ 78; [1998] 2 CLJ 797 (*Kredin*).

[34] The appellant in *Kredin* sought to appeal against a decision of the Court of Appeal and applied to the Federal Court for leave to appeal under s 96 of the Courts of Judicature Act 1964 ('CJA'). The appellant contended that although the word 'leave' normally implies a discretion, no such discretion was implied by ss 96–97 of the CJA and that being so, leave to appeal ought to be granted by the Federal Court as of right, and not as a matter of discretion.

[35] The respondent, inter alia, argued that discretion, in any case must reside in the Federal Court by virtue of the words 'subject to' appearing in s 96 of the CJA.

[36] Thus a preliminary point of law was posed before the Federal Court for its determination, ie whether under and by virtue of s 96 of the CJA an appeal lies as of right from the Court of Appeal to the Federal Court.

[37] The Federal Court held that the words 'subject to' in the opening phrase of s 96 of the CJA should be given the same meaning as that given by Neal J in his dissenting judgment in *Government of Federation of Malaya v Surinder Singh Kanda* [1961] 1 MLJ 1, namely, 'subject to the procedural limitation of'.

[38] The Federal Court went on to hold that it was the clear intention of Parliament that the conditions upon which leave to appeal may be granted is to be subject to the 'rules regulating the proceedings of the Federal Court in respect of appeals from the Court of Appeal'.

[39] In the present case, the phrase 'this Act' in s 19(1) is defined in s 2 of the said Act to include any subsidiary legislation made under the said Act. As submitted by learned counsel for the applicant, rules are included within the definition of 'subsidiary legislation' by virtue of s 3 of the Interpretation Acts 1948 and 1967.

[40] It therefore follows according to the applicant, that based on the Federal Court decision in *Kredin* the first respondent's discretion under s 19(1)(a)(i) of the said Act must be exercised subject to, among others the said Rules.

[41] To lend further support to their argument that the first respondent had

acted ultra vires the said Rules in arriving at the first respondent's decision, learned counsel referred to the old case of *Chua Bak Heng v Reg* [1957] MLJ 247 (*Chua Bak Heng*). The facts of the case are as follows:

(a) upon an application for the registration of a motor vehicle, the registrar of vehicles ('registrar') would insert in the application form the laden weight approved by him;

(b) there was no specific rule on how the laden weight was to be determined and the registrar derived the figure from the weight specified by the manufacturers of vehicles and if no weight was specified, he would get advice of experts;

(c) the power to regulate the maximum laden weight of motor vehicles was exclusively reserved to the Minister for Communications and Works (Minister) by s 44(1)(d) of the Road Transport Ordinance (Cap 227) ('Ordinance') though no rules were made by the Minister;

(d) the registrar was not empowered by the Ordinance nor any of the rules made under the Ordinance to regulate the maximum laden weight of motor vehicles;

(e) rr 94, 95 and 96 of the Motor Vehicles (Construction and Use) Rules 1948 ('1948 Rules') laid down the maximum laden weight that was to be transmitted to the road surface by motor vehicles; and

(f) the court found that there were two maximum laden weights laid down for motor vehicles — one fixed by the registrar and the other fixed by the Minister in the 1948 Rules.

[42] The court held that:

(a) the registrar had no authority to fix the maximum laden weight of motor vehicles;

(b) the laden weights fixed by the registrar were in conflict with the maximum laden weight laid down in the 1948 Rules; and

(c) the registrar was acting ultra vires by determining the maximum laden weight of motor vehicles.

[43] On the authority of the above case, the applicant argued that, although the facts in *Chua Bak Heng* can be distinguished in that, the registrar did not have any power to determine the maximum laden weight as compared to the first respondent who was vested with a discretionary power under s 19(1) of the said Act, the first respondent's discretion herein is nevertheless qualified and not absolute as shown earlier.

[44] More importantly, according to the applicant, since s 56(1)(b) of the

said Act, confers on the Minister the discretionary power to make rules, concerning, inter alia, the conditions to be attached to licenses granted under the said Act, it therefore follows that the first respondent has no power to fix rates of fare for stage bus services when rates of fares have already been prescribed in the said Rules. By virtue of that, it is the submission of the applicant that RapidKL's fares were in direct conflict with the said Rules. For these reasons, the applicant was of the view that the first respondent was clearly acting ultra vires the said Rules in arriving at its decision.

[45] I agree wholly with the submission of the applicant as set out above and by reason thereof it is also my view that the first respondent's decision to approve RapidKL's application to impose lower rates of fare for stage bus vehicles was ultra vires the said Rules.

[46] For the above reasons also, I was unable to agree with the learned senior federal counsel's (SFC) *submission on behalf of the respondents*, that the first respondent had acted well within its power under s 19(1) of the said Act when it made its decision. SFC's argument that the bus services provided by RapidKL do not fall within the scope of the said Rules for the reasons given in para 4(a) and (b) (supra) is not tenable as r 3(1) of the said Rules clearly provides as follows:

> (1) The rates of fare for a *stage bus*, express bus, executive express bus, mini bus, an employees bus, a feeder bus and a school bus licensed and authorized to operate within Peninsular Malaysia is set out in Part 1 of the First Schedule.

[47] The rates of fare as prescribed in Part 1 of the First Schedule is based on a zoning system. As the rates of fare under the said Rules is based on a zoning system, the first respondent cannot purport to authorise RapidKL to impose lower rates of fare than that prescribed on the ground that it is based on a different system (or modus operandi as the respondents put it), as such a system is not provided for in the said Rules.

[48] Such an act or decision in this case would be ultra vires the said Rules. It would be different if there is a power to exempt RapidKL (or any other stage bus operator for that matter) from the application of the said Rules. But as readily conceded by SFC, no such power is found under the said Act or Rules. In any event as correctly pointed out by counsel for the applicant, the power to exempt (if any) would vest with the Minister not the first respondent by virtue of the Minister's power to make rules under s 56(1) of the said Act. (see s 99(2) of the Interpretation Acts 1948 and 1967).

Relevant considerations and 'wednesbury unreasonableness'

[49] As I had found that the first respondent had acted ultra vires in arriving at its decision, I did not think it necessary to deal with the other grounds relied on by the appellant in support of its application namely, that the first respondent had failed to take into account relevant considerations in arriving at its decision and or that the first respondent's decision and or the second respondent failure, omission or refusal to enforce the rates of fare under the said Rules (said failure, omission or refusal) was unreasonable based on the established principle of 'wednesbury unreasonableness'.

Unfair discrimination

[50] Next I will deal with the complaint of unfair discrimination. The crux of the applicant's contention on this issue is that by its decision as well as the first respondent's and or the second respondent's said failure, omission or refusal, the first respondent and or the second respondent had practiced unfair discrimination on the applicant.

[51] Relying on the Court of Appeal decision in *Ahmad Tajudin bin Hj Ishak v Suruhanjaya Pelabuhan Pulau Pinang* [1997] 1 MLJ 241 ('Ahmad Tajudin'), the applicant contended that unfair discrimination is actionable in Malaysia.

[52] In *Ahmad Tajudin*, the Court of Appeal laid down three essential elements that must be proven in order to succeed in establishing unfair discrimination. They are:

(a) there must be *some form of discrimination*;

(b) the discrimination must be *unfair*; and

(c) there must be *resultant harm or injury*.

[53] The Court of Appeal's decision in *Ahmad Tajudin* was cited with approval in the majority decision of the Court of Appeal in *Osman bin Mohd Idris & Ors v Ketua Pengarah Perkhidmatan Awam Malaysia* [2006] 4 MLJ 516; [2006] 3 CLJ 106.

[54] The applicant contended that it had proven all the three elements set out by the Court of Appeal in that:

[55] Firstly, *discrimination* was practiced on the applicant because based on the facts as appear below, RapidKL and the applicant though in similar

circumstances, were treated differently:

(a) both RapidKL and the applicant provided stage bus services;

(b) both RapidKL and the applicant fall within the regulatory ambit of the said Act;

(c) both RapidKL and the applicant come under the licensing control of the first respondent;

(d) rates of fares for stage bus services are provided under the said Rules;

(e) s 19(1)(a)(i) of the said Act is subject to the said Rules;

(f) RapidKL's fares are much lower as compared to the rates of fare provided under the said Rules; and

(g) the applicant is obliged to comply with the said Rules;

[56] Secondly, the *discrimination was unfair* because there was unjust and or unreasonable and or unfair bias in favour of RapidKL and against the applicant because:

(a) RapidKL is a wholly-owned company of the second respondent;

(b) RapidKL is the 'vehicle' incorporated by the second respondent to implement the second respondent's plan ie INSPAK;

(c) of the first respondent and or the second respondent's omission (to enforce the prescribed rates of fare on RapidKL) despite the applicant's appeals to the first respondent and or the second respondent's; and

(d) the first respondent and or the second respondent's failure (to enforce the rates of fare on RapidKL) despite the applicant's letter of demand to the first respondent demanding that the first respondent enforce the presented rates.

[57] Thirdly, as a result of the first respondent's decision as well as the first respondent and or the second respondent's said failure, refusal or omission the applicant *suffered financial difficulties*.

[58] Based on the aforesaid reasons, it was the applicant's contention that the applicant had been unfairly discriminated against by the first respondent and or the second respondent.

[59] It was also the applicant's argument that the administrative action taken by the first respondent and or the second respondent had violated art 8(1) of the Federal Constitution.

[60] Article 8(1) of the Federal Constitution provides that:

> All persons are equal before the law and entitled to the equal protection of the law.

[61] As 'Law' under art 160(2) of the Federal Constitution is defined to include 'written law' the said Act, being an Act of Parliament clearly falls within the definition of written law.

[62] The applicant however is not alleging that the said Act or the said Rules are discriminatory. The applicant is alleging that the first respondent and or the second respondent being the authority entrusted with the duty of carrying the statute into operation have acted in a discriminatory manner. In a case where the statutory authority in question practiced discrimination by treating equals differentially, or by not following the policy or principle laid down in the legislation to regulate its discretion, the charge of violation of equal protection may be laid against the administration and its action quashed under art 8(1) of the Federal Constitution. In support of this proposition the applicant referred to the following authorities:

(a) MP Jain & SN Jain, *Principles of Administrative Law*, (5th Ed),(2007), at pp 650–651;

(b) (the decision of the Supreme Court of the United States of America in *Yick Wo v Hopkins* (1886) 118 US 356 ('Yick Woo'); and

(c) the Indian Supreme Court's decision in *Vishundas Hundumal v The State of Madhya Pradesh* AIR 1981 SC 1636, at pp 1636–1638.

[63] In *Yick Wo*, the City of San Francisco, by an Ordinance, made it unlawful to carry on a laundry, without the consent of the board of supervisors, except in a brick or stone building. In administering it, 200 Chinese launderers were denied permission, even though they complied with every requisite, while 80 non-Chinese under similar circumstances had been permitted. The Supreme Court of USA held the discrimination was illegal and a denial of the equal protection of the laws. It was stated that:

> Though the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to be unjust and illegal discrimination between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution.

[64] In the present case the applicant argued that:

(a) Parliament had granted wide discretionary powers to the first respondent

in respect of, among others, conditions to be attached to licenses granted under the said Act vide s 19(1) of the said Act;

(b) the Minister, being empowered by Parliament to make rules under s 56(1) of the said Act, made the said Rules where the rates of fare for every class of public vehicles were specifically provided under the said Rules;

(c) the first respondent's discretionary power in respect of fares to be charged for specified classes of public vehicles is to be exercised in accordance with the said Rules;

(d) stage bus services is one of the specified classes of public vehicles under the said Rules and the fares to be charged are provided in Part 1 of the First Schedule to the said Rules; and

(e) both the applicant and RapidKL provide the same stage bus services.

[65] It is therefore the applicant's contention that:

(a) the applicant and RapidKL fall within the same class of public vehicle services as classified by Parliament in the said Act;

(b) though similarly situated within the same class, the first respondent had treated RapidKL favourably by allowing RapidKL to charge RapidKL's Fares, without any need to adhere to the said Rules; and

(c) the constitutional right of the applicant under art 8(1) of the Federal Constitution had been violated as a result of the first respondent's decision as well as the first respondent and or the second respondent's said failure, omission or refusal.

[66] Learned senior federal counsel ('SFC') in her oral submission before the court argued firstly, there was no unfair discrimination as the applicant had been granted the license to operate their stage buses since 1992. The mere fact that RapidKL was allowed to impose a lower rate than the prescribed rate does not ipso facto mean that the applicant has been unfairly discriminated.

[67] Secondly, the SFC contended that in order to prove unfair discrimination the applicant must prove mala fide on the part of the first respondent and or the second respondent.

[68] Thirdly, the applicant has failed to prove the third element of unfair discrimination ie that the applicant had suffered some form of injury as a result of the unfair discrimination.

[69] The respondents contended that the applicant has not shown in their

affidavits that the alleged financial loss suffered by the applicant arose out of the respondent's decision. In other words the applicant has failed to show that there was a nexus between the loss they allegedly suffered and the fares charged by Rapid KL. Arguing that the choice of consumers was not dictated solely by the lowering of fares but for other reasons beyond the control of either party, learned SFC maintained that it was purely an assumption on the applicants part to allege that their loss was due to the lower fares charged by RapidKL.

[70] On this issue of unfair discrimination, I had at the end of the hearing after having carefully considered the submissions of counsel for the applicant and respondent decided that there was insufficient evidence before the court to support a finding of unfair discrimination.

[71] In *Ahmad Tajudin*, the Court of Appeal propounded that discrimination per se is not actionable unless it is also unfair. As to what amounts to unfair discrimination, the Court of Appeal opined as follows:

> To be actionable, discrimination must be accompanied by an element of *harshness* or unfairness. In other words *there must be unjust or unreasonable or unfair bias* in favour of one and against another. See *Dost Mohammod v Union of India* 1981 Lab IC 1210; *Ranbir Singh v Chief Commercial Superintendent* AIR 1961 Punj 268. Generally speaking, there must be a rational nexus between the conduct complained of as amounting to discrimination and the object that is sought to be achieved by it. *At the end of the day, an objective assessment of the facts of a particular case should leave the court with the impression that a plaintiff has received harsh, unreasonable or unfair treatment in the hands of the defendant.* (Emphasis added.)

[72] In my view although on the face of the facts set out in para (i)–(vii) above, discrimination appeared to have been practiced on the applicant, such discrimination per se according to *Ahmad Tajudin* was not actionable. The second element to be considered is whether there was unfair discrimination or as the Court of Appeal (in *Ahmad Tajudin*) puts it, whether upon an objective assessment of the facts the applicant had 'received harsh, unreasonable or unfair treatment in the hands' of the respondents.

[73] To my mind the facts relied on by the applicant to show unfair discrimination ie that RapidKL is a wholly-owned company of the second respondent; RapidKL is a 'vehicle' incorporated by the second respondent to implement INSPAK; that the first and or second respondent's had omitted to take action against RapidKL despite the applicant's appeals and the first and or second respondent had failed to implement the rates of fare in the said Rules despite the applicant's letter of demand to that effect (see para 24 of encl (3)), do not leave the court with the impression that the applicant had received 'harsh, unreasonable or unfair treatment' in the hands of the respondents such that the applicant could be said to be unfairly discriminated against.

[74] This is particularly so in the light of the first respondent's reply that 'Respondent Pertama tidak pernah menghalang mana-mana pihak termasuk Pemohon untuk mengemukakan permohonan bagi menggunapakai kadar tambang sama sepertimana RapidKL' (see para 13.3, encl (12)). Further according to the first respondent:

> … sehingga kini, Pemohon adalah merupakan satu-satunya syarikat bumiputra yang mendapat lesen bas berhenti-henti yang terbanyak di Lembah Kelang (see para 16.4, encl (12)).

[75] As regards the third element or ingredient of unfair discrimination ie damage or resultant harm or injury arising from the alleged discriminating act, it is the applicant's case that the introduction of RapidKL's Fares had led the applicant to suffer loss and other financial problems. In fact this is the raison de'tre for the applicants present application. In the affidavit in support of their application (encl (3)), the applicant contended as follows:

> … akibat pengenalan Kadar Tambang RapidKL, Pemohon telah mengalami pelbagai masalah seperti yang dinyatakan berikut:
>
> (a) Pemohon telah mengalami kerugian yang teruk dan mendadak disebabkan berkurangnya jumlah penumpang Perkhidmatan Bas Berhenti-henti Pemohon sejak 21.4.2007. Hasil kutipan Pemohon untuk Jalan-jalan tersebut —
>
> (i) sebelum 21.4.2007 dianggarkan RM310,380 sehari; dan
>
> (ii) selepas 21.4.2007 dianggarkan RM222.060 sehari. Oleh itu, Pemohon telah dan masih mengalami penurunan hasil kutipan sebanyak lebih kurang RM88,320 sehari, iaitu sebanyak lebih kurang RM2,737,920 sebulan sejak 21.4.2007;
>
> (b) Kadar Tambang RapidKL adalah jauh lebih rendah berbanding dengan kos operasi Perkhidmatan Bas Berhenti-henti Pemohon; dan
>
> (c) Pemohon mempunyai obligasi-obligasi kewangan seperti berikut —
>
> (i) Pemohon mempunyai lebih kurang 1,600 pekerja yang mempunyai tanggungan-tanggungan (dependants) mereka yang berkenaan;
>
> (ii) setakat 31.7.2007, Pemohon mempunyai jumlah pinjaman sebanyak lebih kurang RM32 juta daripada

institusi-institusi kewangan tempatan dan Pemohon dikehendaki membayar sejumlah lebih kurang RM1.6juta sebulan untuk pinjaman-pinjaman tersebut; dan

(iii) kos operasi Perkhidmatan Bas Berhenti-henti Pemohon semakin meningkat akibat, antara lain, kenaikan harga minyak diesel dan kenaikan harga alat ganti bas.

Details of the applicant's alleged loss had been forwarded to the 'first respondent vide its letter dated 22 June 2007 (exh A-7(b), encl (3)).

[76] On this issue I agree with the SFC's submission that the applicant has failed to show by credible and cogent evidence that the abovesaid loss was due to the lower rates of fare charged by RapidKL. In other words the applicant had failed to establish a nexus between the reduction in the applicant's income or profits from the fare collection with the introduction of RapidKL's fares. The purported reduction in the daily and monthly fare collection as shown in exh A-7(b) (p 51 of encl (3)) was not based on any study or survey carried out by the Applicant. As submitted by the learned SFC, the reduction in the number or passengers after 21 April 2007 as contended by the applicant (and the consequent loss of profits or income) could be due to a variety of factors which may or may not include the lower fares charged by RapidKL. In the absence of such a survey or study or any other form of verification I would agree with the respondents' contention that the applicant's claim that the abovesaid loss was attributable the first respondent's decision was purely an assumption on the part of the applicant. The applicant had therefore failed to establish that it had suffered any resultant harm or injury from the alleged discriminatory act (ie the first respondent's decision as well as the first and or the second respondents said failure, refusal or omission).

[77] On the facts therefore the applicant was unable to prove, in particular, the second and third elements of unfair discrimination as laid down by the Court of Appeal in *Ahmad Tajudin*. For the reasons stated above I came to the conclusion that there was insufficient evidence before the court to show that the applicant had suffered unfair discrimination.

[78] Learned SFC had also submitted that to establish discrimination under art 8, the applicant has to prove mala fide on the part of first respondent and or the second respondent.

[79] Encik KK Wong, learned counsel for the applicant contended otherwise, that mala fide is not a necessary ingredient for discrimination to be established under art 8.

[80] However the Supreme Court of India in the case of *State of West Bengal v Anwar Ali* AIR 1952 encl 75 when considering the issue of whether s 5(1) of the Bengal Special Courts (X(10) of 1950) was ultra vires art 14 of the Constitution of India (which is equivalent to our art 8) held, inter alia, as follows:

> when the statute is not itself discriminatory and the charge of violation of equal protection is only against the official, who is entrusted with the duty of carrying it into operation, the equal protection clause could be availed of in such cases, *but the officer would have a good defence if he could prove bona fides.* (Emphasis added.)

[81] In holding that the charge of violation of the equal protection clause is available against an official entrusted with carrying out the statute into operation, the Supreme Court referred to and followed the case of *Yick Wo* (see p 91 of the judgment). But as regards the defence of bona fides on the part of the official, Mukherjea J speaking for the Supreme Court appeared to have accepted the reasoning of the US Court in the case of *Sunday Lake Iron Co v Wakefield* (1918) 247 US 350 as can be seen from the following passage:

> It appears to be an accepted doctrine of American Courts that the purpose of the equal protection clause is to secure every person within the states against arbitrary discrimination whether occasioned by the express terms of the statute or by their improper application through duly constituted agents. This was clearly laid down in *Sunday Lake Iron Co v Wakefield* (1918) 247 US 350. In this case, the complaint was against a taxing officer, who was alleged to have assessed the plaintiffs properties at their full value, while all other persons in the country were assessed at not more than one third of the worth of their properties. It was held that the equal protection clause could be availed if against the taxing officer, *but if he was found to have acted* bona fides and the discrimination was the result of a mere error of judgment on his part, the action would fail. (Emphasis added.)

[82] In the present case, the applicant alleged that the first respondent's decision and or the second respondents said failure, omission or refusal was mala fide, particulars of which were set out in para 26 of the applicant's affidavit in encl (3). The particulars of mala fide set out in para 26 were basically the same as the applicant's grounds in support of its claim of unfair discrimination except for the following additional allegations:

> (d) matlamat utama Responden Kedua dalam melaksanakan Rancangan Responden Kedua adalah untuk membolehkan RapidKL mendapat monopoli perkhidmatan bas awam di Lembah Kelang ('Matlamat Tersebut');
>
> (e) untuk mencapai Matlamat Tersebut, keputusan Responden Pertama serta kegagalan Responden Pertama dan/ atau Responden Kedua 'memaksa'

A

> syarikat-syarikat pengangkutan awam yang lain termasuk Pemohon untuk memberhentikan perkhidmatan mereka agar Responden Kedua dapat mengambil alih perkhidmatan syarikat-syarikat tersebut melalui RapidKL;

B

[83] These allegations were the applicant's own inferences and were not based on any independent evidence. They were vigorously denied by the first respondent (see paras 15 and 16, encl (12)) and were not seriously pursued by learned counsel for the applicant in his oral submission.

C

[84] The first respondent in their affidavit in reply (encl (12)) reiterated that:

> Respondent Pertama tiada matlamat untuk membenarkan kegiatan monopoli oleh mana-mana syarikat bas awam di mana-mana laluan.

D

[85] The first respondent maintained that approval for any licence 'dibuat berdasarkan kepada keperluan polisi dan dasar kerajaan.'

E

[86] In support of the above statement, Puan Naimah bt Ramli, director of the first respondent in her affidavit at encl (31) stated:

> … saya menyatakan bahawa *kelulusan Kadar Tambang mengikut Jenis Perkhidmatan vang diberikan kepada RapidKL adalah berasaskan kepada matlamat dasar dan polisi INSPAK* (see para 3 of encl (31)).

F

[87] She also exhibited a letter from the Ministry of Finance dated 24 April 2008 which explained the background and purpose behind the incorporation of RapidKL (see exh NR2).

G

[88] In reply counsel for the applicant submitted that there was no evidence to show that the first respondent's decision was for the objective stated by the first respondent ie for the enhancement of the public transport service. He also dismissed Puan Naimah's affidavit to that effect as being an after thought.

H

[89] Counsel also argued that even if it was accepted that the objective of the first respondent's decision was for providing better public transport services it should not be at the expense of the applicant. The introduction of RapidKL's fares had caused unfair competition to the applicant and the other stage bus operators.

I

[90] Whilst I agree that the first respondent's decision should not be at the expense of the applicant (although the alleged loss suffered by the latter could

not be shown on the facts before the court to be directly linked to RapidKL's fares), or the said Rules that in itself could not be said to amount to mala fide on the part of the first respondent.

[91] To my mind, the first respondent's explanation that the approval given to RapidKL's fares was based on the policy objective of providing an integrated public transport services in the Klang Valley or INSPAK must be accepted in the absence of any evidence to the contrary. Based on this explanation, it could not be said that the first respondent's decision was made mala fide. Rather, it would appear on the facts to be done in good faith or at least with bona fides intention, albeit in error of judgment in view of my finding (earlier in the judgment) that the said decision was ultra vires the said Rules.

MANDAMUS

[92] As stated earlier in my decision I had dismissed prayer 4(a) (of the applicant's statement in encl (1)) for an order of mandamus directing the first respondent and second respondent to enforce the rates of fare as prescribed under the said Rules on RapidKL as I found that there is no specific duty imposed on the first respondent under the said Act or Rules to enforce the said rates of fare on RapidKL.

THE APPLICANT'S SUBMISSION

[93] The applicant do not dispute that by virtue of O 53 r 1(2) of the Rules of the High Court 1980 ('RHC') an application for mandamus under para 1 of the Schedule to the CJA made pursuant to O 53 of the RHC must comply with s 44(1) of the Specific Relief Act 1950 (SRA). In particular, the applicant must satisfy all five conditions laid down in the proviso to s 44(1) of the SRA. In this regard the applicant was in agreement with the respondents that the five conditions in the said proviso are cumulative and all of them must be fulfilled, (see *Koon Hoi Chow v Pretam Singh* [1972] 1 MLJ 180 (*(Koon Hoi Chow)*; *Ng Bee v Chairman Town Council, Kuala Pilah* [1975] 1 MLJ 273 (Ng Bee)).

[94] The applicant submitted that all the five conditions are satisfied in the present case as:

(a) the applicant has a clear and specific legal right to have the rates of fare as prescribed under the said Rules be enforced by the first respondent and second respondent on RapidKL because:

(i) both RapidKL and the applicant provide stage bus services;

(ii) both RapidKL and the applicant fall within the ambit of said Act;

(iii) both RapidKL and the applicant come under the licensing control of the first respondent;

(iv) rates of fares for stage bus services are provided under the said Rules;

(v) the first respondent's discretion under s 19(1)(a)(i) of the said Act must be exercised subject to the said Rules;

(vi) RapidKL's fares are much lower as compared to the rates of fare provided under the said Rules;

(vii) the applicant is obliged to comply with the said Rules; and

(viii) as a result of the first respondent's decision as well as the first respondent and or the second respondent said failure, omission or refusal the applicant suffered financial difficulties.

(b) the first respondent has a statutory duty to exercise its discretion under s 19(1)(a)(i) of the said Act subject to the said Rules;

(c) the enforcement of the said Rules on RapidKL by the first respondent and second respondent is consonant to right and justice; and

(d) other than by way of mandamus, the applicant has no other remedy to require first respondent and second respondent to enforce the said Rules on RapidKL.

[95] The applicant further contended that as required by law, they have made a distinct and specific demand to the first respondent that it enforces the said Rules. The first respondent had, by its response to the demand made, notified the applicant about the first respondent's decision and requesting the applicant to make an application to charge fares similar to those of RapidKL's fares. By its response, the first respondent had manifestly refused to comply with the demand by the applicant.

— (See *Workon Sdn Bhd v The Director of Land & Surveys, Sabah* [1999] 4 MLJ 177 (*Workon Sdn Bhd*).

THE RESPONDENTS' SUBMISSION

[96] Learned SFC submitted that the issue before the court is whether the applicant had succeeded in bringing this instant case within the purview of s 44(1) of the SRA.

[97] It was submitted by the respondent that the applicant has failed to bring this case within the purview of s 44(1) when the applicant failed to satisfy the two requirements of s 44(1) namely:

(a) an application for such an order be made by some person whose property,

franchise, or personal right would be injured by the forbearing or doing, as the case may be, of the said specific act; and

(b) such doing or forbearing is, under any law for the time being in force, clearly incumbent on the person or court in his or its public character, or on the corporation in its corporate character.

[98] As regards the first condition under proviso (a) above, learned SFC submitted that there was nothing in the affidavits of the applicant to state unequivocally what was the personal right of the applicant in the matter in question and that the applicant's personal right would be injured if the first respondent failed to perform his statutory duties.

[99] In the premises, according to the respondents the plaintiff have failed to satisfy proviso (a) to s 44(1) of the SRA (see the judgment of Ajaib Singh J in *Ng Bee* and the case of *Thien Tham Sang v United States Army Medical Research Unit & Anor* [1983] 1 MLJ 97 and *Workon Sdn Bhd v The Director of Lands & Surveys, Sabah* [1999] 4 MLJ 177 (*Workon Sdn Bhd*).

[100] The applicant, according to the respondents has also failed to satisfy the second condition of s 44(1) of the SRA in that the applicant must show that the first respondent has a statutory duty to enforce the said rates of fare on RapidKL.

[101] In support of this argument the learned SFC referred to the judgment of Sharma J in *Koon Hoi Chow* and concluded that based on His Lordship judgment there was no duty cast upon the first respondent to enforce the said rates of fare on RapidKL under s 19(1) of the said Act.

[102] Having considered carefully the submissions of both counsel for the applicant and the respondents, I was of the view that the applicant had failed to satisfy the condition in proviso (b) of s 44(1) of the SRA. Section 44(1) of the SRA states as follows:

> A Judge may make an order requiring any specific act to be done or forborne, by any person holding a public office, whether of a permanent or a temporary nature, or by any corporation or any court subordinate to High Court:
>
> Provided that —
>
> (a) an application for such an order be made by some person whose property, franchise, or personal right would be injured by the forbearing or doing, as the case may be, of the said specific act;

A

(b) *such doing or forbearing is, under any law for the time being in force, clearly incumbent on the person or court in his or its public character, or on the corporation in its corporate character;*

B

(c) in the opinion of the Judge the doing or forbearing is consonant to right and justice;

(d) the applicant has no other specific and adequate legal remedy; and

C

(e) the remedy given by the order applied for will be complete. (Emphasis added.)

[103] In my view it is very clear from the opening words of s 44(1) that an order of mandamus is an order requiring a person holding public office to do or forbear doing a *specific act*. In fact the heading of the section reads:

D

Power to order public servants and others to do certain *specific acts*. (Emphasis added.)

E

[104] The specific act which a public officer may be ordered to do or forbear from doing under proviso (b) has been elucidated by Sharma J in *Koon Hoi Chow* as follows:

F

Proviso (b) requires that the doing or forbearing must be clearly incumbent on the person in his public character. *There must be under the law some duty cast upon the public officer.* If he does not do the duty, then the court will call upon him to perform that duty. (Emphasis added.)

G

[105] In *Ng Bee*, Ajaib Singh J, in determining, inter alia, the nature of the duty under proviso (b) opined as follows:

H

Secondly, the respondent in my opinion was under no duty to make any application to the magistrate. *The duty sought to be performed must be clear and obligatory.* Section 76(iii)(b) of the Town Boards Enactment did empower the Respondent to make an application to the magistrate for a demolition order but the subsection did not impose any duty on him to do so. (Emphasis added.)

I

[106] Thus, based on the views expressed by Their Lordships in *Koon Hoi Chow* and *Ng Bee* proviso (b) of s 44(1) of the SRA envisages that there must be a clear and obligatory duty to perform a specific act imposed on the public officer under the law.

[107] The question that arises here is whether there is such a duty imposed on the first respondent under s 19(1) of the said Act. A

[108] Section 19(1) of the said Act confers on the first respondent a discretion when granting a licence to attach such conditions as it may think fit, which in the context of the present case relates to the specified fares to be charged by stage bus operators such as the applicant and RapidKL (see s 19(1)(a)(i) of the said Act). B

[109] The contention of the applicant is that in exercising its discretion under s 19(1)(a)(i) the first respondent is under a duty to exercise it subject to the said Rules or in accordance with the said Rules and by virtue of that it should have imposed the same condition on RapidKL as it had imposed on the applicant, that is for RapidKL to charge the prescribed rates of fare. C D

[110] Thus if, as contended by the applicant the first respondent fails or refuses, upon being demanded to do so by the applicant to exercise its discretion subject to the said Rules, as was the case here, then in the applicant's view the court can compel the first respondent to exercise its discretion accordingly and enforce the prescribed rates on RapidKL. E

[111] In my view it is implicit that when exercising its discretion under s 19(1)(a)(i) of the said Act the first respondent would act in accordance with the law ie it would exercise it subject to the said Rules. This is based on established legal principles governing the exercise of such discretion. However, that requirement does not to my mind amount to a duty under the law as envisaged by proviso (b) of s 44(1) of the SRA and as expressed by Sharma J and Ajaib Singh J in their judgments in *Koon Hoi Chow* and *Ng Bee* respectively. F G

[112] As explained by Sharma J:

> An order under s 44 of the Specific Relief Ordinance is in its nature an order of mandamus which is a peremptory order of the court commanding somebody to do that which it was his *clear legal duty* to do (see p 181 of *Koon Hoi Chow*). (Emphasis added.) H

[113] In my view no such clear legal duty is imposed on the first respondent by s 19(1)(a)(i) of the said Act, such that the refusal by the first respondent to perform that duty would justify the grant of the preemptory order of mandamus under s 44(1) of the SRA. I

[114] In the premises I therefore held that the applicant had failed to satisfy the condition in proviso (b) of the SRA and therefore dismiss the prayer for an

order of mandamus. It is not necessary for me to deal with the other four conditions in the said proviso as s 44(1) of the SRA can only be invoked if all five conditions are satisfied.

[115] In any event the order of mandamus to my mind is no longer necessary as I have already granted the order declaring the first respondent's decision as ultra vires the said Rules and such order would therefore be binding on all parties.

[116] However Encik KK Wong informed the court that as a declaratory order has no coercive force he was compelled, in *ex abundanti cautela*, to apply for an order of mandamus to ensure that the said declaratory order was complied with by the first respondent and the second respondent. But in this regard it is perhaps instructive to refer to His Lordship Arifin Zakaria FCJ's (as he then was) observation on this issue-In the United Kingdom it is settled law that the Crown has a duty to obey the law as declared by the courts (see *Reg v Secretary of State for Transport, Ex parte Factortame Ltd* [1990] 2 AC 85). Likewise in Malaysia the government, be it the Federal Government or the state government, is subordinated to the law. As His Royal Highness Azlan Shah FCJ (as he then was) candidly stated in *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187; [1975] 1 LNS 90:

> The Constitution is not a mere collection of pious platitudes. It is supreme law of the land embodying three basic concept: One of them is that the individual has certain fundamental rights upon which not even the power of the State may encroach. The second is the distribution of sovereign power between the State and the Federation, that the 13 States shall exercise sovereign power in local matters and the nation in matters affecting the country at large. The third is that no single man or body shall exercise complete sovereign power, but that it shall be distributed among the Executive, Legislative and Judicial branches of Government, compendiously expressed in modern terms that we are a government of laws, not of men (see *Minister of Finance, Government of Sabah v Petrojasa Sdn Bhd* [2008] 4 MLJ 641; [2008] 5 CLJ at p 349).

DAMAGES

[117] I did not make any order for damages against the first respondent and the second respondent as Encik KK Wong had submitted that damages is only

claimable if there was a breach of art 8 of the Federal Constitution. As the court found that there was insufficient evidence to prove breach of art 8, the question of damages does not arise.

Order accordingly.

Reported by Ashok Kumar